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June 11, 2010

AOR 2010-11

**BY HAND DELIVERY**

Thomaseia Duncan, Esq.  
General Counsel  
Federal Election Commission  
999 E. Street N.W.  
Washington, D.C. 20463

**Re: Commonsense Ten Advisory Opinion Request**

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437(f), we seek an advisory opinion on behalf of Commonsense Ten. As this request pertains to proposed public communications referencing clearly identified Federal candidates, including some candidates with primary elections less than sixty days away, Commonsense Ten requests that the Commission expedite this request and render an opinion within twenty days.<sup>1</sup> In the alternative, because this request addresses a highly significant and time-sensitive issue, Commonsense Ten requests that the Commission expedite this request and render an opinion within thirty days under its general expedited process.<sup>2</sup>

## I. INTRODUCTION

In the past six months, opinions by the United States Supreme Court and the U.S. Court of Appeals for the District of Columbia have significantly expanded the range of permissible activities under the Federal Election Campaign Act. The Supreme Court, in *Citizens United v. FEC*,<sup>3</sup> has made clear that the government may not limit independent expenditures by

<sup>1</sup> See Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 Fed. Reg. 32,160, 32,162 (July 7, 2009).

<sup>2</sup> See *id.*

<sup>3</sup> 130 S. Ct. 876 (2010).

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corporations and labor organizations.<sup>4</sup> A pair of rulings by the D.C. Circuit – one of them a unanimous en banc decision – has struck down restrictions on contributions to political committees that will be used to make independent expenditures.<sup>5</sup> A panel of the Ninth Circuit has recently come to the same conclusion.<sup>6</sup> The unavoidable result – as the D.C. Circuit has expressly recognized – is that political organizations may accept donations from corporations and labor organizations and use those funds to make independent expenditures.<sup>7</sup>

In the wake of these opinions, there has been an explosion of political activity by entities organized under sections 501(c)(4) and 501(c)(6) of the Internal Revenue Code – which are under no obligation to make their donors public.<sup>8</sup> While the courts have time and again upheld the right of the government to require reasonable disclosure of contributions and expenditures,<sup>9</sup> these groups remain in the shadows, able to make express advocacy expenditures with minimal disclosure obligations.

Believing that "[s]unlight is said to be the best of disinfectants,"<sup>10</sup> Commonsense Ten plans instead to engage in fully disclosed activity as a federally registered political committee. It would meet all registration, reporting, and administrative requirements imposed by federal law. It seeks Commission affirmation that its proposed course of action, expressly approved by the Court of Appeals, is lawful.

## II. FACTUAL BACKGROUND

Commonsense Ten is a federal nonconnected unauthorized political committee. It has recently filed Form 1 with the Commission.<sup>11</sup> Up until now, it has solicited contributions that conform to

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<sup>4</sup> See *id.* at 913.

<sup>5</sup> See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

<sup>6</sup> See *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010).

<sup>7</sup> See *EMILY's List*, 581 F.3d at 12 n.11; see also *Thalheimer v. City of San Diego*, \_\_\_ F. Supp. 2d \_\_\_ (S.D. Cal. 2010) (granting a preliminary injunction against a ban on non-individual contributions to an independent expenditure committee).

<sup>8</sup> See I.R.C. § 6104(d)(3)(A).

<sup>9</sup> See *SpeechNow.org*, 599 F.3d at 698.

<sup>10</sup> Louis D. Brandeis, "What Publicity Can Do," *Harper's Weekly*, Dec. 20, 1913.

<sup>11</sup> See 2 U.S.C. § 433.

the source restrictions and amount limitations of the Federal Election Campaign Act of 1971, as amended ("FECA").<sup>12</sup> Commonsense Ten intends to sponsor and pay for independent expenditures: communications expressly advocating the election or defeat of a clearly identified federal candidate.<sup>13</sup> It will not make any direct or in-kind contributions to federal candidates; political party committees; or any other federal political committee that does make contributions to federal candidates or political party committees.

Commonsense Ten intends to solicit and accept contributions from corporations and labor organizations. It also intends to solicit and accept contributions from individuals and other federal political committees in excess of \$5,000 per calendar year; some individuals may therefore exceed their biennial aggregate limits were their contributions to Commonsense Ten be counted under those limits.<sup>14</sup> Commonsense Ten intends to deposit these contributions in its federal account, commingled with its existing contributions. Commonsense Ten will not solicit or accept funds from foreign nationals as defined by 2 U.S.C. § 441e; federal contractors as defined by 2 U.S.C. § 441c; or national banks or corporations organized by act of Congress.<sup>15</sup>

All contributions aggregating in excess of \$200 within the calendar year – including corporate and labor organization contributions and individual contributions in excess of \$5,000 per calendar year – will be fully disclosed on Commonsense Ten's reports to the Commission.<sup>16</sup> With the exception of FECA's source prohibitions and amount limitations, Commonsense Ten intends to comply with all other FECA requirements on federal political committees.

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<sup>12</sup> See *id.* §§ 441a(a), 441b.

<sup>13</sup> See *id.* § 431(17).

<sup>14</sup> See *id.* § 441a(a)(3).

<sup>15</sup> See *id.* § 441b(a).

<sup>16</sup> See *id.* § 434.

### III. LEGAL DISCUSSION

#### A. Legal Background

##### 1. Corporations and Labor Organizations May Make Independent Expenditures

Earlier this year, the United States Supreme Court issued its decision in *Citizens United*.<sup>17</sup> The Court struck down laws banning independent electoral and issue advocacy sponsored by corporations. In its opinion, the Court overturned its earlier precedent in *Austin v. Michigan Chamber of Commerce*,<sup>18</sup> and struck down a federal law banning corporations from making independent expenditures in connection with federal elections. It also invalidated provisions that prohibited corporations from sponsoring electioneering communications. The Court noted: "Political speech is indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual . . . ." <sup>19</sup>

##### 2. Contributions to Independent Expenditure Committees May Not Be Limited

Subsequently, the U.S. Court of Appeals for the District of Columbia held that under the First Amendment, contributions to an independent expenditure committee may not be limited.<sup>20</sup> Though the court was asked only to permit unlimited contributions from individuals to a political committee making independent expenditures – a request it unequivocally granted<sup>21</sup> – the unanimous, en banc decision makes plain that "the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations."<sup>22</sup> The court also held that the biennial aggregate contribution limit may not be applied to contributions to independent expenditure committees.<sup>23</sup>

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<sup>17</sup> 130 S. Ct. 876.

<sup>18</sup> 494 U.S. 652 (1990).

<sup>19</sup> 130 S. Ct. at 904.

<sup>20</sup> *SpeechNow.org*, 599 F.3d at 696.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*; *see also* N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 295 (4th Cir. 2008).

<sup>23</sup> *See* 599 F.3d at 696.

At the same time, the court upheld FECA's organizational and reporting requirements as applied to independent expenditure committees.<sup>24</sup> It noted: "the public has an interest in knowing who is speaking about a candidate and who is funding that speech."<sup>25</sup>

A panel of the U.S. Court of Appeals for the Ninth Circuit recently issued an opinion concurring in the conclusion of *SpeechNow.org*. However, the Ninth Circuit went even further in its reasoning, noting that the anti-distortion rationale – the historical justification for the ban on corporation and labor organization expenditures<sup>26</sup> – was no longer available to justify limitations on contributions to independent expenditure committees.<sup>27</sup>

### **3. Corporate and Labor Union Contributions May Be Accepted by Independent Expenditure Committees**

The clear result of *Citizens United* and *SpeechNow.org* is that the FECA source prohibitions and amount limitations may no longer be constitutionally applied to organizations making only independent expenditures. As the Ninth Circuit explained, the *Citizens United* decision eliminated the anti-distortion rationale, and there is no threat of corruption or the appearance of corruption by contributions to independent expenditure committees. Thus, there is simply no longer any legitimate governmental interest in regulating such contributions.<sup>28</sup>

The combined effect of these decisions was predicted and explained by the D.C. Circuit in *EMILY's List v. FEC*. There the court held, in a precursor to *SpeechNow.org*, that contribution limits may not be applied to an account used for expenditures other than contributions to candidates and political parties. The court went on to explain: "If *Austin* were overruled, then non-profits would be able to make unlimited express-advocacy expenditures from their soft-money accounts even if they accepted donations from for-profit corporations or unions to those accounts."<sup>29</sup> Less than two months after that opinion was issued, *Citizens United* explicitly overruled *Austin*. The only logical result is that corporations and labor organizations may now legally give to independent expenditure committees, just as they may make independent expenditures on their own.

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<sup>24</sup> See *id.* at 698.

<sup>25</sup> *Id.*

<sup>26</sup> See *Austin*, 494 U.S. at 661.

<sup>27</sup> *Long Beach Area Chamber of Commerce*, 603 F.2d at 693.

<sup>28</sup> *Id.* at 693-95.

<sup>29</sup> *EMILY's List*, 581 F.3d at 12 n.11.

**B. Commonsense PAC Is Committed To Meeting All Remaining Legal Obligations**

While Commonsense Ten intends to exercise its First Amendment right to collect and spend unlimited individual, corporate and labor organization contributions in its independent political advocacy, it takes very seriously the duties of a responsible political organization. It has no wish to evade legitimate government efforts to permit the public to know the identity of its contributors, and the details of its political spending. It therefore intends to operate entirely within the bounds of the FECA's disclosure requirements.

Though the Supreme Court did not consider the matter,<sup>30</sup> Commonsense Ten will voluntarily screen and refuse contributions from foreign nationals, be they individuals or foreign principals;<sup>31</sup> Commonsense Ten will also screen and refuse contributions from government contractors<sup>32</sup> and corporations chartered by act of Congress.<sup>33</sup>

**C. The Commission Need Not Wait for a Rulemaking**

While it is evident that the Commission must engage in a rulemaking to conform its regulations to *Citizens United*, *SpeechNow.org*, and *EMILY's List*, it need not wait for that process to unfold before granting the relief Commonsense Ten seeks. The Commission has issued advisory opinions relying on court precedent even when outdated regulations are still in place. For instance, after the D.C. Circuit ruled that the Commission's membership regulations were too restrictive,<sup>34</sup> the Commission relied on that decision to grant an advisory opinion request ruling in favor of the Chicago Mercantile Exchange, while the offending membership definition – that would have dictated a contrary result – was still on the books; as here, a petition for rulemaking had been filed, but no further regulatory action had been taken.<sup>35</sup> The Commission then did not delay acting until new rules were in place; it cannot, and should not, delay acting now.

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<sup>30</sup> See *Citizens United*, 130 S. Ct. at 911.

<sup>31</sup> See 2 U.S.C. § 441e; 22 U.S.C. § 611(b).

<sup>32</sup> See 2 U.S.C. § 441c.

<sup>33</sup> See *id.* § 441b(a).

<sup>34</sup> See *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

<sup>35</sup> See Advisory Opinion 1997-5.

Thomasenia Duncan, Esq.  
June 11, 2010  
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**IV. QUESTION PRESENTED**

Commonsense Ten seeks confirmation that its planned course of action complies with FECA.

Please do not hesitate to call us should you have any additional questions.

Very truly yours,



Marc E. Elias  
Ezra Reese

cc: Matthew S. Petersen, Chairman  
Cynthia L. Bauerly, Vice Chair  
Caroline C. Hunter, Commissioner  
Donald F. McGahn II, Commissioner  
Steven T. Walther, Commissioner  
Ellen L. Weintraub, Commissioner



"Elias, Marc (Perkins Coie)"  
<melias@perkinscoie.com>  
06/15/2010 05:49 PM

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To <NStipanovic@fec.gov> PM 6:12  
cc <rknop@fec.gov>, Rosemary Smith <rsmith@fec.gov>, Thomasenia Duncan <Tduncan@fec.gov>  
bcc  
Subject Re: Advisory Opinion Request on behalf of Commonsense Ten

2010 JUN 15 PM 6:12  
OFFICE OF GENERAL  
COUNSEL

Correct.

1. Commonsense Ten will not make contributions nor coordinated expenditures within the meaning of the Act. (It will of course make disbursements for operations — e.g., administrative costs).
2. Commonsense Ten is not affiliated with any political committee or other group that makes contributions within the meaning of the Act.

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Marc E. Elias  
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202-654-9126 (fax)  
[melias@perkinscoie.com](mailto:melias@perkinscoie.com)

From: <NStipanovic@fec.gov>  
Date: Tue, 15 Jun 2010 17:35:25 -0400  
To: Marc Elias <[melias@perkinscoie.com](mailto:melias@perkinscoie.com)>  
Cc: <rknop@fec.gov>, Rosemary Smith <rsmith@fec.gov>, Thomasenia Duncan <[Tduncan@fec.gov](mailto:Tduncan@fec.gov)>  
Subject: Advisory Opinion Request on behalf of Commonsense Ten

Mr. Elias,

Following our conversation this afternoon regarding your advisory opinion request on behalf of Commonsense Ten, please confirm our understanding of the following:

- (1) Commonsense Ten intends to make only independent expenditures; and
- (2) Commonsense Ten will not be affiliated with any political committee or group that makes contributions.

Thank you.

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Neven F. Stipanovic  
Attorney, Policy Division  
Office of General Counsel  
U.S. Federal Election Commission  
Tel: 202-694-1650

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Thank you.



"Elias, Marc (Perkins Coie)"  
 <meli@perkinscoie.com>  
 06/15/2010 05:54 PM

To <NStipanovic@fec.gov>  
 cc <rknop@fec.gov>, Rosemary Smith <rsmith@fec.gov>, Thomasenia Duncan <Tduncan@fec.gov>  
 bcc  
 Subject Re: Advisory Opinion Request on behalf of Commonsense Ten

History: This message has been replied to.

Did my email response make sense? While its an IE-only committee, it will have operating costs (administrative, like bank fees, etc) that wont qualify as IE's or contribution. If you need further clarification, let me know. I am still around.

--  
 Marc E. Elias  
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 OFFICE OF GENERAL  
 COUNSEL

**From:** <NStipanovic@fec.gov>  
**Date:** Tue, 15 Jun 2010 17:35:25 -0400  
**To:** Marc Elias <meli@perkinscoie.com>  
**Cc:** <rknop@fec.gov>, Rosemary Smith <rsmith@fec.gov>, Thomasenia Duncan <Tduncan@fec.gov>  
**Subject:** Advisory Opinion Request on behalf of Commonsense Ten

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Neven F. Stipanovic  
 Attorney, Policy Division  
 Office of General Counsel  
 U.S. Federal Election Commission  
 Tel: 202-694-1650

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